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February 2, 2015

David Murillo
Regional Director
Mid Pacific Region
U.S. Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

Sent via e-mail to Erin Curtis at ecurtis@usbr.gov

Subject: Comments on Draft Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River (Draft Plan)

Dear Mr. Murillo;

Thank you for the opportunity to comment on this important Draft Plan to prevent the outbreak of disease in salmon within the Lower Klamath and Trinity Rivers during late summer and fall. Given the extraordinary efforts to maintain and restore salmon and steelhead populations in the Klamath-Trinity basin, it is vitally important to prevent a repeat of the 2002 fish kill in which at least 65,000 adult salmon perished in the lower Klamath River due to a large run, poor water conditions and the resultant disease outbreak of *Ich* and *Columnaris*.

We commend you for your draft plan and the intention to move toward use of Humboldt County's 50,000 AF water contract under the provisions of the recent Solicitor's Opinion. C-WIN agrees with the findings of the Solicitor's Opinion. We have specific comments on amendment of Reclamation's California water permits as well as recommendations on modeling of hydropower losses and cold-water carryover storage needs to preserve the anadromous fishery resource.

The unique protection afforded the Trinity River, its fisheries and water is embodied in State and federal law. The special legal status of the Trinity River to do no harm has been expressed in numerous legal opinions, court decisions and administrative actions at both the State and federal level. This special status creates a priority for the use of Trinity River water for Trinity River fisheries and other in-basin uses that is superior to any other use of CVP water outside of the Trinity River basin.

Federal Laws and Policies

Leo Krulitz explained the primacy of the waters of the Trinity River for use in the

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Trinity River basin in a 1979 Interior Solicitor's Opinion¹ on the water contract and drought shortage provisions with the Grasslands Water District:

"...in authorizing the Trinity River Division in 1955, Congress specifically provided that in-basin flows (in excess of a statutorily prescribed minimum) determined by the Secretary to meet in-basin needs take precedence over needs to be served by out of basin diversions."

The Trinity River Act of 1955 (PL 84-386) "*directed and authorized*" the Secretary of Interior to "*preserve and propagate*" the fish and wildlife resources of the Trinity River. Another provision in the 1955 Act reserved 50,000 acre-feet for Humboldt County and downstream water users.

The Trinity River Basin Fish and Wildlife Restoration Act of 1984 (PL 98-541) clarified the above language from the 1955 Trinity River Act to mean "*...restoring fish and wildlife populations in the Trinity River basin to a level approximating that existed immediately before the construction of the Trinity River division.*"

Under the Tribal Trust Doctrine, and the federally reserved fishing rights of the Hoopa Valley and Yurok tribes there is a property right associated with the flows of the Trinity River. These rights date back "*10,000 years or time immemorial*"², making them senior to any water rights obtained by the Bureau of Reclamation for the Central Valley Project.

The Central Valley Project Improvement Act, PL 102-575 (CVPIA), Congressionally defined that in order to meet the Tribal Trust responsibility to the Hoopa Valley Tribe and to meet the fishery restoration goals of the 1955 Act, Interior MUST complete the ROD, obtain the Hoopa Valley Tribe's concurrence and implement it accordingly, while charging the CVP customers for its implementation. CVPIA also acknowledged the difference between the Trinity River and Central Valley streams by having separate fishery restoration goals for each basin

The Reclamation Act (Section 8), as well as the Central Valley Project Improvement Act (Section 3406(b)) waived the federal government's sovereign immunity as subservient to state water rights authority. In the case of CVPIA, there was a very specific Congressional waiver of Reclamation's sovereign immunity for California water laws including decisions of the State Water Resources Control Board (SWRCB).

Federal Clean Water Act Section 303 approval by the United States Environmental Protection Agency of Trinity River Water Quality Objectives in 1992³ constituted

¹ http://www.c-win.org/webfm_send/156

² http://www.schlosserlawfiles.com/~hoopa/SolOp_93.pdf

³ See letter from USEPA Region IX Administrator to Chairman of California SWRCB approving Trinity River Basin Plan temperature objectives, March 13, 1992. Accessed at http://www.c-win.org/webfm_send/416

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establishment of federal water quality standard that all federal agencies, including the Bureau of Reclamation must comply with.

USEPA also stated in their approval that Trinity River diversions to the Sacramento River are a controllable factor in protection of the Trinity River and have harmed the Trinity River.

The 2000 Trinity River Record of Decision (page 17)⁴ clearly stated:

“From the inception of the TRD, Congress directed this Department to ensure the preservation and continued propagation of the Trinity River’s fishery resources and to divert to the Central Valley only those waters surplus to the needs of the Trinity Basin.”

The 2000 Trinity River Biological Opinion by the National Marine Fisheries Service⁵ contained two provisions to prevent harm to the Trinity River fishery from warm water discharges out of Trinity Dam by requiring powerplant bypasses and a minimum cold-water pool of 600,000 acre-feet in Trinity Lake on September 30 of each year.

State Laws and Policies

The Trinity River’s fisheries have protections under the concept of the Public Trust Doctrine, as expressed in the Mono Lake Opinion (National Audubon Society vs. Alpine County Superior Court).⁶ *“The public trust...is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands....”* – Supreme Court of California, 1983

The Area of Origin and Watershed Protection Statutes under California law contain a priority for in-basin uses compared to out of basin uses. The waters of the Trinity River are subject to California’s Watershed Protection, Area of Origin and County of Origin Statutes (Water Code Sections 10505, 11128 and 11460 et seq.) that limit the export of its waters to surplus flows only. Water Code Section 11128 specifically applies the watershed protection and county of origin statutes to the Bureau of Reclamation’s Central Valley Project, which includes the Trinity River Division.

Each of Reclamation’s eight Trinity River water permits contains three separate conditions (8-10) requiring instream fishery flow releases of 120,500 AF/year, 50,000 AF/year for Humboldt County, and a condition requiring County of Origin water releases pursuant to Water Code Section 10505).

⁴ Trinity River Record of Decision, USDOT, 2000.

<http://odp.trrp.net/FileDatabase/Documents/Trinity%20River%20Record%20of%20Decision%2012-19-00.pdf>

⁵ National Marine Fisheries Service (2000), Biological Opinion for the Trinity River Record of Decision, accessed at: http://www.fws.gov/arcata/fisheries/reports/technical/TREIS_BO_NMFS.pdf

⁶ <http://www.monobasinresearch.org/legal/83nassupct.html>

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The California Department of Fish and Game (DFG), in its comments on the Supplemental EIS/EIR for the Trinity River Mainstem Fishery Restoration Program,⁷ stated that impacts to listed species in the Central Valley and Delta as a result of increased Trinity River flows (and decreased Trinity exports to the Sacramento River) are not a “significant impact” requiring mitigation under the California Environmental Quality Act. DFG cited California’s watershed protection and area of origin statutes as the rationale for the determination that the priority for Trinity River water is within that basin:

“In California, the controls put in place governing a single source of water supply from two separate basins, requires needs for beneficial uses in the basin of origin be met first-then needs can be supplied for the other basin.”

State Water Resources Control Board Water Permit Change Petition

Reclamation holds eight water permits for storage and diversion of the Trinity River. Footnote 18 on page 22 of the Draft Plan states Reclamation’s intent to submit a change petition to the SWRCB for a Water Code Section 1701 and 1707 water transfer for flow augmentation. The footnote references a letter from the SWRCB indicating that release of Trinity water for late summer flow augmentation is not a permitted use and recommends Reclamation submit a change petition. Failure to obtain a change petition would lead to that amount of water becoming abandoned water under the California Water Code.

This is an important concept and has ramifications beyond just late summer flow augmentation. The existing minimum instream flow in Reclamation’s Trinity River water permits is only 120,500 AF/year. The weighted annual average instream flow release under the 2000 Trinity River Record of Decision (ROD) is 594,500 AF. The difference is 474,000 AF of water that must also be dedicated to instream flow releases in order for Humboldt County’s 50,000 AF to be counted in addition to fishery flows.

Attached is correspondence between the SWRCB and Humboldt County in which the SWRCB states that according to Reclamation’s water permit terms and conditions, Humboldt County’s 50,000 AF is additive with fishery flows with a minimum annual release of 170,500 AF/year being required. Lewiston Dam releases have been well in excess of that amount since 1979. The SWRCB also indicated that if Humboldt County’s 50,000 AF is to be used for instream flow purposes, that Reclamation would need to submit a change petition for increased instream flow releases.

Therefore, in order for Humboldt County’s 50,000 AF to be released in addition to Trinity ROD flows and in conformance with state water permits, Reclamation should apply for a water permit change petition under Water Code Sections 1701 and 1707

⁷ See DFG’s 6/22/2004 letter at http://c-win.org/webfm_send/157

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that includes provisions for cumulative release of Trinity ROD flows, Humboldt County Lewiston Dam releases and Trinity County consumptive uses in conditions 8, 9 and 10 in Reclamation's Trinity River water permits.

Furthermore, the change petition should also include incorporation of a term and condition in Reclamation's water permits to comply with North Coast Basin Plan temperature objectives for the Trinity River.

The concept of doing no harm to the Trinity River is also manifested in Water Right Order 90-05 (WRO 90-05)⁸, which contained a term and condition prohibiting harm to the Trinity River as it relates to the export of Trinity River water to the Sacramento River for temperature control on the Sacramento River.

WRO 90-05 also cited a Trinity-specific temperature water right proceeding promised in SWRCB Water Quality Order 89-18 (page 17)⁹ that has yet to be held. The limited Trinity River protections contained in WRO 90-05 and the need to amend Reclamation's Trinity River water permits for temperature control are discussed in detail below.

The North Coast Regional Water Quality Control Board and the California State Water Resources Control Board approved Trinity River temperature objectives in 1991, which were approved by USEPA in 1992.

Daily Average/Period / River Reach

60°F July 1 - Sept. 14 Lewiston Dam to Douglas City Bridge

56°F Sept. 15 - Oct. 1 Lewiston Dam to Douglas City Bridge

56°F Oct. 1 - Dec. 31 Lewiston Dam to confluence of North Fork

Trinity River

Water Right Order 90-05 prohibits Reclamation from diverting water from the Trinity River for the purpose of temperature control on the Sacramento River in a manner which would harm the Trinity River by exceeding the above Basin Plan temperature objectives of 56°F. However, WRO 90-05 does not prohibit Reclamation from exceeding the 60°F (the Basin Plan objectives were adopted after WRO 90-05). It also

⁸ See SWRCB Water Right Orders 90-05 and 91-01 at http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1990/wro90-05.pdf and http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1991/wro91-01.pdf.

⁹ See SWRCB Water Quality Order 89-18 at http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/1989/wq1989_18.pdf

does not prohibit Reclamation from violating any of the Basin Plan temperature objectives for other beneficial uses of water such as irrigation, power, Delta water quality, Municipal/Industrial, wildlife refuges, etc. Therefore WRO 90-05 provides very limited temperature protection for the Trinity River because it does not apply to the 60°F summer objective and Trinity River water is used for several purposes other than Sacramento River temperature control including water quality in the Delta.

Therefore, in order to protect anadromous fisheries, the change petition should also include incorporation of a term and condition in Reclamation's water permits to comply with North Coast Basin Plan temperature objectives for the Trinity River. There should also be a term and condition added to

Temperature Control, Hydropower Losses and Cold Water Carryover Storage

Section 6.3.2 of the Draft Plan expresses concerns with additional drawdown of Trinity Lake with resultant need for Trinity powerplant bypasses in order to meet temperature objectives. Reservoir drawdown of less than 1 million AF increases the need for Trinity powerplant bypasses.

The NMFS 2000 Biological Opinion for the Trinity River¹⁰, includes a minimum carryover storage on September 30 of 600,000 AF and requires reconsultation if storage falls below that level. However, other analyses have found that 600,000 AF minimum carryover storage is inadequate. A 2012 report¹¹ by Reclamation found that September 30 carryover storage requirement of less than 750,000 AF is "problematic" in meeting state and federal Trinity River temperature objectives protective of the fishery.

In 1992 Balance Hydrologics¹² found that a minimum carryover storage of 900,000 AF was necessary to meet Basin Plan temperature objectives.

Analyses completed for Trinity County for the Trinity Record of Decision by Kamman Hydrologics¹³ indicated that September 30 carryover storage of at least 1.2 million AF on September 30 is necessary at the beginning of a simulated 1928-1934 drought in order to meet Basin Plan temperature objectives. We are now into a fourth year of drought and Trinity Lake storage is below levels necessary to survive a historic multi-year drought such as 1928-1934.

¹⁰ National Marine Fisheries Service (2000), Biological Opinion for the Trinity River Record of Decision, accessed at: http://www.fws.gov/arcata/fisheries/reports/technical/TREIS_BO_NMFS.pdf

¹¹ See Bender MD (2012) Trinity Reservoir Carryover Storage Cold Water Pool Sensitivity Analysis. Technical Memorandum No. 86-68220-12-06, U.S. Bureau of Reclamation, Technical Service Center, Denver, CO. Accessed at <http://odp.trrp.net/Data/Documents/Details.aspx?document=1813>

¹² See Balance Hydrologics (6/26/1992) "The Need for Standards for Minimum Carryover Storage in Trinity Reservoir" Accessed at <http://tcrd.net/trl-stor.htm>

¹³ Memorandum from Greg Kamman to Tom Stokely and Mike Deas on Carryover Storage Analysis Simulated (1928-34) Period, 5/22/1998. Accessed at http://www.c-win.org/webfm_send/414

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Furthermore, Reclamation's Mid-Pacific office also produced a preliminary technical memorandum¹⁴ on the problem of excessive heating of Trinity Dam releases when they pass through the shallow 7-mile long Lewiston Reservoir. While Trinity Dam releases are normally 43-44°F, summer heating in Lewiston Reservoir can be severe unless approximately 1,800 cfs is being released from Trinity Dam. Given that Trinity River summer base flows are only 450 cfs, water must be diverted to the Sacramento River to keep the Trinity River cold enough to meet Basin Plan temperature objectives.

However, during severe drought or under certain operational circumstances, there may not be adequate water to provide base fishery flows and to divert water to the Sacramento River to keep the Trinity River cold. Several structural solutions have been identified in Reclamation's preliminary technical memorandum; however, a full feasibility study and environmental document would need to be prepared to select a solution and no such plans exist at this time.

The Draft Plan indicates on page 21 that "The drawdown of Trinity Reservoir below 600,000 a-f in total storage incrementally contributed to the requirement to later bypass power generation at Trinity Powerplant for TRD temperature management."

We suggest that modeling be performed for any analysis that looks at carryover storage of 600,000 AF, 900,000 AF and 1.2 million AF for the purposes of temperature control and determination of long-term powerplant bypass generation losses. It is important to note that Reclamation's 2000 Trinity Dam Enhancement Technical Appraisal¹⁵ concluded that it would not be worth it to raise Trinity Dam unless there is a cold-water carryover storage requirement greater than 900,000 AF. The conclusion is based on an analysis by Reclamation's Nancy Parker that uncontrolled spills (losses to storage) are not significant if carryover storage is less than 900,000 AF. Since Trinity Dam powerplant bypasses do not generally occur at storage of less than 1 million AF, a carryover storage requirement of 900,000 AF should minimize powerplant bypasses without significantly reducing long term CVP yield. Modeling of various carryover storage requirements and their impact on CVP long term yield and powerplant bypasses would be instructive to determine a long-term carryover storage requirement that meets the needs of the fishery without significant long term losses to CVP water and power production from the Trinity River Division.

Therefore, in order to provide protection for Trinity River anadromous fisheries

¹⁴ See USBR (2012) Lewiston Temperature Management Intermediate Technical Memorandum, Lewiston Reservoir, Trinity County, California. Report by U. S. Bureau of Reclamation, Mid-Pacific Region, Sacramento, CA. accessed at <http://odp.trrp.net/Data/Documents/Details.aspx?document=1814>

¹⁵ See "Technical Service Center (2000) Trinity Dam Enhancement Technical Appraisal." Report prepared by the USBR Technical Service Center and Mid-Pacific Regional Office for the Regional Planning Office Mid-Pacific Region." Accessed at <http://odp.trrp.net/Data/Documents/Details.aspx?document=2037>

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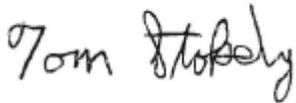
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Reclamation's change petition to the SWRCB for Reclamation's eight Trinity River water permits should include the following conditions:

- Conformance with the instream fishery flows contained in the Trinity River Record of Decision.
- Provision for release of Humboldt County's 50,000 AF and Trinity County of Origin consumptive water use in addition to fishery flows.
- Inclusion of permit terms and conditions to require Reclamation to comply with the Trinity River temperature objectives contained in the Water Quality Control Plan for the North Coast Region (NCRWQCB) for all relevant time periods and for all uses of Trinity water diverted to the Sacramento River.
- A requirement to maintain an adequate supply of cold water in Trinity Reservoir adequate to preserve and propagate all runs of salmon and steelhead in the Trinity River below Lewiston Dam during multi-year drought similar to 1928-1934.

Thank you for the opportunity to comment. We look forward to your response to our comments. Please send any responses to Tom Stokely's contact information below.

Sincerely,



Tom Stokely
Water Policy Analyst &
Trinity River Advocate
201 Terry Lynn Ave.
Mt. Shasta, CA 96067
tstokely@att.net



Carolee Krieger
Executive Director

Attachment: 2004 Correspondence on 50,000 AF between SWRCB and Jill Geist, Humboldt County Board of Supervisors.



State Water Resources Control Board



Division of Water Rights

1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
 Sacramento, California 95812-2000
 www.waterrights.ca.gov

Arnold Schwarzenegger
 Governor

Post-it® Fax Note	7671	Date	8-11-04	# of pages	15
To	Jill Geist	From	Jill Geist		
Co./Dept.		Co.	Humboldt Co. - SUPERVISORS		
Phone #		Phone #	476-2395		
Fax #	530-623-1353	Fax #			

In Reply Refer to:
 363:CAR:262.0(53-16-03)

Humboldt County Board of Supervisors
 c/o Honorable Jill Geist
 825 5th Street, Room 111
 Eureka, CA 95501

BOARD OF SUPERVISORS
 AUG 11 2004
 AM 7/8/9/10/11/12/1/2/3/4/5/6 PM

Dear Ms. Geist:

COMPLAINT AGAINST THE U.S. BUREAU OF RECLAMATION REGARDING THE TRINITY RIVER DIVISION OF THE CENTRAL VALLEY PROJECT IN TRINITY COUNTY

Staff of the Division of Water Rights (Division) has completed an initial review of the complaint filed by the Humboldt County Board of Supervisors against the U.S. Bureau of Reclamation (USBR) regarding operation of the Trinity River Division (TRD) of the Central Valley Project. A "Memo to File" regarding this review is enclosed.

Flow records indicate that total releases of water below Lewiston Dam since the 1978 water year have been more than sufficient to meet the minimum required fishery flows and to provide an additional 50,000 acre-feet per annum (afa) that could have satisfied the requirements of both Humboldt County and other downstream users pursuant to Term 9 of the TRD water right permits. Consequently, it does not appear that the USBR has withheld water from Humboldt County and other downstream water users. Additionally, based on the opinion of the Ninth Circuit Court of Appeals issued July 13, 2004, the flow releases in the Trinity River may be substantially increased on a permanent basis.

Based on the information contained in the complaint documents, the Board of Supervisors may not understand the apparent intent of Term 9 of the TRD permits. I believe that this term was included to provide some "area of origin" protection for Humboldt County and other downstream users. In other words, after the minimum bypass requirements specified in Term 8 were met, the USBR could be required to release additional flows from project storage, if necessary, so that at least 50,000 acre-feet per annum would still be available for diversion downstream between Lewiston Dam and the Pacific Ocean.

Diversions could be accomplished in several ways. Downstream diversions could be made under the diverter's own basis of right, which would need to be an appropriative right to divert water

Honorable Jill Geist

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released from storage¹. If the County of Humboldt wishes to appropriate water for instream beneficial uses, California law requires that the water be taken under physical control rather than just allowed to flow down the channel. [Fullerton v SWRCB (1979) 90 Cal.App.3d 301.] Before the County of Humboldt could make use of the contract with the USBR to obtain water, the USBR would need to file a petition and obtain an order changing the authorized place of use under the TRD permits. If the USBR chose not to seek such an order, the County of Humboldt would probably need to seek relief in the federal courts to enforce the contract.

A look at the actual flows in the river shows that the minimum and average flows in the affected reaches of the Trinity and Klamath Rivers since the inception of the TRD project facilities in 1964 have been:

Trinity River at Hoopa, CA (USGS Gage 11530000):

Average Flow = 3,495,366 acre-feet per annum

Minimum Flow = 1,240,876 acre-feet per annum

Klamath River near Klamath, CA (USGS Gage 11530500):

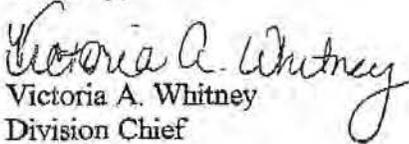
Average Flow = 11,478,459 acre-feet per annum

Minimum Flow = 5,371,106 acre-feet per annum

The actual minimum flows have been twenty to one hundred times greater than the flows that would be contributed by Term 9. In addition, Table 1 of the enclosed Memorandum indicates that the minimum release below Lewiston Dam since 1979 was 224,694 acre-feet per annum, or almost 130,000 acre-feet more than would be necessary to meet the requirement of Term 9. Diversions between Lewiston Dam and the gage near Hoopa are much smaller. Consequently, the potential for the USBR to need to make additional releases to satisfy the requirements of Term 9 is extremely small.

In view of the above information, the Division of Water Rights will take no further action with respect to this complaint at this time. If there are any questions, I can be reached at (916) 341-5423 or Charles Rich, Chief of the Division's Complaint Unit, can be reached at 341-5377.

Sincerely,


Victoria A. Whitney
Division Chief

¹ - Riparian rights do not authorize diversion of water released from storage because stored water is "foreign" in time. However, riparian right holders have first call on natural flow in the river and sufficient amounts of these flows would have to be bypassed to satisfy downstream riparian rights.

Honorable Jill Geist

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cc: See next page.

cc: U.S. Department of the Interior
Regional Solicitors Office
Pacific Southwest Region
2800 Cottage Way, E-1712
Sacramento, CA 95825-1890

Mr. Andrew P. Tauriainen
Kronick Moskowitz Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814



Terry Tamminen
Secretary for
Environmental
Protection



Arnold Schwarzenegger
Governor

MEMORANDUM

TO: File 262.0 (53-16-03)

FROM: Charles Rich, Chief - CAR
Complaint Unit
DIVISION OF WATER RIGHTS

DATE: July 27, 2004

SUBJECT: COMPLAINT BY THE HUMBOLDT COUNTY BOARD OF SUPERVISORS
AGAINST THE USBR'S TRINITY RIVER PROJECT

Background

The Board of Supervisors for Humboldt County filed a formal complaint against the U.S. Bureau of Reclamation (USBR) on June 9, 2004. The basis of the complaint is described as follows:

"Humboldt County has a 1959 permanent contract with the Bureau of Reclamation (BOR) for 50,000 acre-feet of water every year and has repeatedly expressed our desire to make this water available.

On March 25 of 2003, the Board of Supervisors notified the Department of the Interior and BOR of our intent to have that water be made available for the beneficial uses associated with fisheries on the lower Klamath, Trinity/Klamath confluence and Trinity River. A year has transpired and, to date, neither the Department of the Interior nor BOR has replied."

In response to this complaint, I undertook a review of the files for the Trinity River Division (TRD) of the Central Valley (CVP) Project. Most of the correspondence for this project is contained in the file for the low numbered filing; i.e., Application 5627 (Permit 11968).

The water right applications for the TRD were protested by the California Department of Fish and Game (DF&G). A hearing regarding the unresolved protest against the TRD applications was commenced on December 29, 1958 and continued on May 5, 1959. Permits were issued pursuant to Permit Order 124 dated September 10, 1959. The following terms, that have a bearing on the recent complaint, were included in the permits issued:

- *(Term 8) Permittee shall at all times bypass or release over, around or through Lewiston Dam the following quantities of water down the natural channel of Trinity River for the protection, preservation and enhancement of fish and wildlife from said dam to the mouth of said stream;*

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*October 1 through October 31 – 200 cfs
November 1 through November 30 – 250 cfs
December 1 through December 31 – 200 cfs
January 1 through September 30 – 150 cfs*

Any water released through said Lewiston Dam for use in the fish hatchery now under construction adjacent thereto shall be considered as partial fulfillment of the above schedule.

- *(Term 9) Permittee shall release sufficient water from Trinity and/or Lewiston Reservoirs into the Trinity River so that not less than an annual quantity of 50,000 acre-feet will be available for the beneficial use of Humboldt County and other downstream users.*

The question which is posed in the recent complaint filed by Humboldt County is whether these two terms are “additive” to or “inclusive” of each other. A “Memo to Files” dated May 5, 1959, from hearing staff for the State Water Rights Board indicates that a “Memorandum of Operating Agreement” between the USBR and the DF&G was offered into evidence as a joint exhibit from both parties. This memorandum set forth the releases to be made through Lewiston Dam into the natural channel of the Trinity River for the preservation of fish and wildlife. The memo to files also states:

“An agreement between the United States and Humboldt County was mentioned by Mr. Silverthorne, and an unexecuted copy thereof was given to the Board. Some discussion was had concerning the relation of the releases for fish and wildlife and the releases for Humboldt County. However, no conclusive statement was given by the representatives of the Bureau of Reclamation as to whether said releases were to be additive or whether the releases for fish and game included the release for Humboldt County. . . . The hearing was concluded with the understanding that should the Board so desire, after reviewing the executed agreement between the United States and Humboldt County, the hearing would be reconvened upon notice thereby.”

A letter dated May 6, 1959 was subsequently submitted by the Deputy Attorney General representing the DF&G. This letter states:

“Since the Water Rights Board has continued the hearings in the above noted matter for the purpose of determining whether or not to receive in evidence the contract reached between the United States and the County of Humboldt, and since there may be some difference of opinion as to the interpretation of that contract and the agreement entered into between the United States and the Department of Fish and Game, I wish to make the following observations:

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Paragraph 1 of the Operating Agreement reached between the DF&G and the United States reads as follows:

- '1. BUREAU shall at all times bypass or release over, around and through Lewiston Dam the following quantities of water down the natural channel of the Trinity River for the protection, preservation, and enhancement of fish and wildlife from said dam to the mouth of said stream:*

Oct. 1 through Oct. 31 – 200 cfs

Nov. 1 through Nov. 30 – 250 cfs

Dec. 1 through Dec. 31 – 200 cfs

Jan. 1 through Sept. 30 – 150 cfs

Any water released through said Lewiston Dam for use in the fish hatchery now under construction adjacent thereto shall be considered as partial fulfillment of the above schedule.'

It is my understanding that the above quoted matter requires a release by the United States of the specified flows for stream maintenance purposes and it is also my understanding that none of these flows may be assigned or designated by the United States for any other purpose; that is, while the United States is not bound to forever maintain these flows from the Lewiston Dam to the mouth of the Trinity River as against other proposed diversions, it is required to make these flow releases in excess of any releases that it makes for other downstream uses.

Paragraph 8 of the proposed contract between the United States and the County of Humboldt provides:

- '8. The United States agrees to release sufficient water from Trinity and/or Lewiston Reservoirs into the Trinity River so that not less than an annual quantity of 50,000 acre-feet will be available for the beneficial use of Humboldt County and other downstream users.'*

It is my view that any water released under that paragraph for the use of Humboldt County and other downstream users, is in excess of the flows released for stream maintenance.

I hope this will clear up any possible misunderstanding as to the meaning of the Agreement entered into between the United States and the California Department of Fish and Game."

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The Regional Director of the USBR responded with a letter dated June 1, 1959. This letter indicates that USBR staff had reviewed the May 6th letter from the Office of the Attorney General. The letter also contains a statement that the Finding of Feasibility of the Secretary of the Interior for the TRD project was predicated upon the assumption that a total of 120,500 acre-feet per annum (afa) would be released down the natural channel below Lewiston Dam. The Regional Director also pointed out that *"There is no legislative history to substantiate an assertion, or any reason to assume that the 50,000 acre-feet set forth in Section 2 of Public Law 386 is additive to the required fish release or any other release."* The Regional Director expressed the opinion, based on historical streamflow, that the release of any water in addition to the required fishery flows would result in a waste of water to the ocean.

By letter dated June 8, 1959, the Office of the Attorney General was provided a copy of the June 1st letter from the USBR and asked if the DF&G is in agreement with the position provided therein. I have been unable to locate any materials in the files indicating that either the Office of the Attorney General or the DF&G responded to this request in either a verbal or written fashion. However, the Deputy Attorney General assigned to this matter was in the process of retiring from state service and setting up a private practice and this request may have been overlooked.

The USBR submitted a letter dated June 19, 1959, which enclosed an executed copy of the contract between the USBR and the County of Humboldt. This letter states: *"This contract has been executed on the basis of our firm position that the 50,000 acre-feet made available thereby is not additive to the 120,500 acre-feet annually to be released from Lewiston Dam as provided in an agreement between the United States and the State Department of Fish and Game dated March 27, 1959, copies of which have been furnished to you."* The USBR letter was acknowledged by the State Water Right Board via a letter dated June 25, 1959. No mention of the "additive versus inclusive nature" of the terms is contained therein. Permit Order 124 was subsequently prepared and the permits issued thereafter.

During the midst of the severe drought of 1976-77, the Trinity County District Attorney sent a letter dated March 7, 1977, to the State Water Resources Control Board (SWRCB) and a letter dated March 17, 1977, to the USBR. These letters contain arguments for maintaining a higher lake level for recreational benefits pursuant to the assignment of State Filings by the California Water Commission to the USBR. The March 17th letter mentions the fishery releases of 125,000 afa and the contract with Humboldt County for 50,000 ac-ft of release. The District Attorney concluded that the total required releases from Trinity Reservoir will be 175,000 ac-ft. He also indicated that it would be prudent to hold an additional two-year supply of 350,000 ac-ft in storage to ensure that these releases can continue to be made should the drought persist.

The County of Trinity subsequently filed a formal complaint with the SWRCB on April 1, 1977 alleging that any drawdown of Trinity Lake below 837,600 ac-ft by the USBR constitutes a violation pursuant to Water Code Sections 11460 and 11463 (area of origin protections) and the need to release 175,000 afa to comply with permit terms intended to protect fish and wildlife

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resources and downstream users in Humboldt County. The complainant also requested that the SWRCB ask the Attorney General to seek an injunction to prevent drawdown of Trinity Lake below 837,600 ac-ft for county of origin needs.

An "Engineering Staff Analysis of Record" dated June 2, 1977 was prepared by Division staff. Staff found that the fishery release schedule had been modified slightly in 1968 by the DF&G and the USBR without notifying the SWRCB. However, the modifications were minor and resulted in the same annual release. Flows had been reduced below these levels once in 1976 to repair a wing wall at Lewiston Dam. Concurrence with the reduction had been obtained from DF&G and prior notification was provided to the SWRCB.

Staff noted: "A total annual release of 170,700 af (120,700 af for fish plus 50,000 af for downstream users) was met in water year 1974-75 but not in 1975-76. Likewise, that same pattern was duplicated in calendar year 1975 but not 1976." Apparently, Division staff at that time believed that terms 8 and 9 were additive and not inclusive. Staff concluded the report as follows:

"Trinity County has requested that the Board direct the Attorney General to file an injunction to prevent Trinity Reservoir from being drawn down below 837,600 acre-feet. Because the derivation of the claimed county of origin need of 312,600 af is not supported, and because of the lack of basis for the requirement that 350,000 af of reserve storage is needed, we recommend that an injunction not be requested.

Although we conclude that a violation of two permit terms (number 8 regarding fish releases and number 9 regarding downstream uses) has occurred, it is not of a magnitude to be cause for revocation of the USBR permits. If the USBR intends on continuing operating Trinity/Lewiston Reservoirs as it has in the past, we suggest that consideration be given to temporarily modifying applicable permit terms pursuant to Title 23, California Administrative Code, Section 763.5(d). After cessation of the drought period, the USBR should diligently comply with the existing terms. In the case of the modified fish release schedule, the USBR should formally request Board approval of a modified permit term."

Trinity County was notified via a letter dated August 10, 1977 of the violations that had occurred. This letter indicates that the DF&G had apparently cooperated with the USBR in the method of operation that resulted in these violations. The letter also states: "The need for the maximum use of our water resources during this drought period is obvious. Staff has concluded that the violations cited, in balance, are not sufficient to warrant revocation of the USBR permits." Due to the lack of supporting documentation for the request for pursuit of an injunction, the SWRCB declined to recommend that an injunction be sought. The USBR was also notified (via a copy of

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the letter) that modification of Permit Terms 8 and 9 is necessary if the then-current manner of operating Trinity and Lewiston Reservoirs was to be continued.¹

Trinity County requested a formal hearing before the SWRCB via a letter dated August 19, 1977. A copy of a letter dated October 24, 1973 from the DF&G to the USBR was also included with this request. The October 24th letter indicates that the DF&G had great concerns with the fishery conditions in the river below the project.

The Regional Director of the USBR submitted a letter dated August 23, 1977, in response to the staff report. He argued that no violations have occurred other than changes requested by DF&G which resulted in the same annual release. He also argued that the USBR might not be subject to terms and conditions contained in the permits as long as the Congressional mandates for the project were being met.

The USBR also disagreed with any representation that a violation has occurred with respect to term #9 regarding the release of 50,000 ac-ft for Humboldt County and other downstream users. The letter further states: *"We have a written opinion from the Regional Solicitor, Department of the Interior, that the 50,000 acre-feet are not additive to the fish releases. We fail to understand, therefore, how we can be in violation."*

By letter of November 29, 1977, all parties to the complaint were notified that: *"In accordance with Section 764 of the California Administrative Code, Title 23, 'Waters', the Board has reviewed the record and has decided not to hold a hearing in this matter."*

I have been unable to locate any other material that appears to have a bearing on these terms and the complaint at hand. The SWRCB and its predecessor, the State Water Rights Board, have not previously had a reason to issue a decision ruling on the interpretation of term 9, although the Division has opined that the 50,000 acre-feet is to be added to the fish releases, and a Deputy Attorney General representing the Department of Fish and Game has interpreted the contract and the water right terms as adding the 50,000 acre-feet for Humboldt County to the releases being made for fish.

Related Issues

1. Compliance with fishery flow release requirements (Term 8)

The gaging record for the USGS gage below Lewiston Dam (#11525500) for the period 1964 through 2002 (water years) were downloaded and analyzed. According to the files, diversion for beneficial use at the TRD project did not begin until 1964. While data for the 2003 and 2004 water years is available, this information is still "provisional" and subject to change. In

¹ - I found no evidence that a petition for change was ever filed seeking amendment of these terms.

view of the relatively high releases over the past 20 years or so, I would expect that flows since October 2002 have been greater than required.

In theory, the requirements extend all the way to the mouth of the Trinity River. A long-term record for Gage #11530000, Trinity River at Hoopa, CA is available. However, the Trinity River is a gaining stream with VERY little diversion. Consequently, flows at this location were not evaluated.

Table 1 (attached) provides a summary of flows and apparent violations at the gage below Lewiston Dam. A substantial number of apparent violations (985) occurred during the first 15 years of this record. Only three (3) more occurred thereafter. No violations have occurred since November of 1984. Some of the early violations occurred when the DF&G agreed to a change in release requirements by shifting the 250 cfs flow requirement for November back to the period October 15 to November 14 and neither party notified the SWRCB or sought approval for the change.

2. Status of Fishery Studies and Court Actions

The Trinity River Act of 1955, which authorized the dams and the diversion of water to the Central Valley Project (CVP), also mandated that the fish and wildlife of the basin were not to be harmed. Water was to be provided to the river to achieve that purpose. Within just a few years of construction, very significant adverse impacts to the fishery became apparent. Construction of the project facilities was completed in 1963 and full operation began in 1964. During the first 10 years of operation, an average of 88% of all flows was exported from the basin. During the first 33 years of operation, an average of 68% of all flows was exported. By 1978, the U.S. Fish and Wildlife Service estimated that fishery populations had declined by 60% to 80% and fishery habitat had declined by 80% to 90%. In 1984, Congress directed the Secretary of the Interior via the Trinity River Basin Fish and Wildlife Management Act to implement a restoration program with the objective of restoring fish and wildlife populations levels "to those which existed immediately preceding construction of the (dams)."

Subsequent actions by Interior Secretary Cecil Andrus and requirements in the Central Valley Project Improvement Act of 1992 mandated a study to determine the water requirements for a "healthy" river and a decision on river flows by the end of 1996. That study was completed in May 1999. The Trinity River Record of Decision (ROD) was signed by former Interior Secretary Bruce Babbitt in December 2000. The ROD was based on the Trinity River Mainstem Fishery Restoration EIS/EIR.

The draft EIS/EIR indicates that a primary factor in the decline of the Trinity River ecosystem is the result of decreased water flows into the river along with the resulting changes in river habitats. The "best available science" in the study recognizes that the highest priority for recovery is increased flows. The draft EIS/EIR contains a preferred alternative, that less than

half -- only 48% of the water -- be returned to the river for environmental purposes. Another alternative in the EIS/EIR is called the Maximum Flow Alternative and under this alternative, all of the Trinity water would be returned to the river. This alternative also provides the maximum restoration of fisheries (~81%) among the alternatives considered.

The Maximum Flow Alternative is preferred by native Americans and fishery interests. The hydropower and agricultural industries led by Westlands Water District -- the main beneficiary of Trinity River water -- is strongly opposed to any return of flows to the river. They also question whether the "best available science" is adequate as a basis for a decision. Hydropower and agriculture interests challenged the EIS/EIR in court.

In several rulings between March 2001 and March 2003, Federal District Court Judge Oliver Wanger addressed the lawsuits and ruled as follows:

- The ROD wasn't lawful.
- The EIS had an improperly narrow purpose and need.
- An inadequate range of alternatives was analyzed in the EIS.
- The EIS should have looked at an alternative that minimized the amount of water in the river and maximized exports to CVP customers for out of basin uses, a so-called Integrated Management Alternative.
- The USFWS Biological Opinion (BO) resulted in major modifications to CVP operations without a jeopardy opinion and the effects of implementing the BO were not properly disclosed.
- The Reasonable and Prudent Measures (RPM's) in the National Marine Fisheries Service (NMFS) BO were not adequately defined for analysis in the EIS and improperly made implementation of the ROD a condition of compliance, which is circular in nature.
- The EIS contains an inadequate analysis of power implications in Northern California.
- A Supplemental EIS must be completed by July 9, 2004 that includes new BO's from USFWS and NMFS. The new NEPA document must address the original deficiencies of the EIS and the NMFS and USFWS Biological Opinion Reasonable and Prudent Measures must be described in the draft document.
- Fishery Flow releases are limited to 369,000 ac-ft in critically dry years and 453,000 ac-ft in dry, normal, wet and extremely wet years. An additional release of 50,000 ac-ft of water down the Trinity River in the summer of 2003 was to be considered to avert a

potential fish kill in the lower Klamath River, similar to the large chinook fish kill of 33,000 adult spawners that occurred in 2002, pending other actions in the Northern Federal District Court regarding USBR's Klamath Project operations.

- All non-flow actions were directed to proceed immediately (including those relating to the bridges).

A meeting was convened by Bennett Raley, Assistant Secretary for the Department of Interior in early March 2004 in Sacramento with federal agency representatives and native American representatives. The meeting was convened to enable Mr. Raley to present a proposal to settle pending litigation that has blocked implementation of the Trinity River ROD. The tribes rejected the proposal and sought an emergency order in Federal Court. The Ninth Circuit Court of Appeals granted an emergency request by Native American Tribes this past April to send more water down the Trinity River for fish. Flows were ramped up in early May to a maximum release of 6,000 cfs. The USBR ramped flows down to 450 cfs (which are apparently "normal" summer flows even though Term 8 only requires 150 cfs) by July 22nd. These flows were intended to help juvenile fish pass to the ocean more easily. The long-term resolution of this issue was to be achieved via a final, legally acceptable ROD based on the supplemental EIR/EIS mentioned above.

On July 13, 2004, the United States Court Of Appeals for the Ninth Circuit issued Opinion 03-15194. In summary, the Court found as follows:

- The conclusion by the U.S. District Court that the scope of the EIS and the range of alternatives considered therein are unreasonable is reversed.
- The Federal District Court's injunctive orders to supplement the EIS to address the issues raised on appeal are reversed.
- The Federal District Court's ruling that two of the mitigation measures insisted upon by the Fish and Wildlife Service and the National Marine Fisheries Service in their biological opinions exceeded the statutory authority for such opinions is affirmed.
- The three claims raised by Plaintiffs (Westlands et al) on cross-appeal are rejected and the remainder of the Federal District Court's judgment is affirmed.

This decision, unless appealed and overturned, should pave the way for implementation of the ROD and the preferred alternative of the Trinity River Mainstem Fishery Restoration EIS/EIR. The preferred alternative will result in substantially more water being released below Lewiston Dam than is required under Term 8.

3. Compliance with release for Humboldt County pursuant to Term 9

Based on the data in Table 1 (attached), during 10 of the first 15 years of operation, total releases below Lewiston Dam were less than the minimum fishery flow release requirements plus 50,000 ac-ft. After 1979, releases have always exceeded the fishery maintenance flows specified in Term 8 of Permit 11968 plus 50,000 ac-ft. I was unable to locate any materials indicating that Humboldt County requested a release of water pursuant to Term 9 or the contract with the USBR prior to the March 25, 2003 letter from the Board of Supervisors to the Secretary for the Interior that is the basis for the complaint.

To complicate matters, Humboldt County is not within the authorized place of use under the TRD permits and it appears that the purpose of the reservation for Humboldt County and the contract is to provide water for out-of-stream consumptive uses. Consequently, before the USBR could make a release of water stored under the TRD permits strictly to fulfill obligations under Term 9 or the contract with Humboldt County, the USBR should add the county to the place of use for this water under the USBR's permits or Humboldt County or its residents should obtain water rights to appropriate this water after the USBR releases it from Lewiston Dam. Regardless of whether the releases required under Term 9 are inclusive or additive to those required under Term 8, flows of 50,000 afa more than those required under Term 8 have been released pursuant to Congressional directive for fishery maintenance purposes for the past 20+ years. Releases equivalent to the maximum required under Term 9 appear to have been achieved in practice, albeit the USBR may not have intended specifically to meet Term 9.

If the Humboldt County Board of Supervisors believes that releases are not being made pursuant to the contract, they will need to pursue this matter in the Federal Courts, as this is a contractual issue outside the authority of the SWRCB.

Conclusions and Recommendation

- a) The information accompanying the order to issue the TRD permits is insufficient to determine if the State Water Rights Board intended in 1958 that the releases mandated under Term 9 for beneficial uses in Humboldt County were to be treated as being related to the releases mandated under Term 8 for protection of the fisheries in the Trinity River, and if so, whether the Humboldt release would be added to the fishery release.
- b) Releases made to protect fisheries pursuant to Congressional directive have been more than adequate to provide the water mandated by Term 9 plus Term 8.
- c) Complaint Unit staff are not aware of any recent violations of either Term 8 or Term 9.

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- d) The protection of the fisheries in the portions of the Trinity and Klamath Rivers located in Humboldt County is before the federal Courts. Unless the decision of the United States Court Of Appeals for the Ninth Circuit identified above is appealed and overturned, the releases from Lewiston Dam will exceed the permit requirements for fish releases even if the water to be provided for Humboldt County is treated as being additive. If the studies are correct, these releases and the other measures to be taken under the preferred alternative will adequately protect the fishery resources of concern to the Humboldt County Board of Supervisors.
- e) The complaint of the Humboldt County Board of Supervisors against the USBR is probably moot if their interest is in augmenting the flow releases in the Trinity River for fish. If in the future Humboldt County obtains a water right permit for diversion of water from the Trinity River and the USBR fails to ensure that enough water is in the river to supply Humboldt's needs as well as its other obligations, including its instream flow obligations, Humboldt County could file another complaint. If Humboldt County instead requests that the USBR add Humboldt County to the place of use of the TRD, and the USBR fails to do so, it would be more appropriate for Humboldt County to seek relief in the federal courts under the contract.

TABLE 1
COMPLIANCE SUMMARY FOR RELEASES BELOW LEWISTON DAM
USGS GAGE 11525500 TRINITY R @ LEWISTON DAM

Water Year	Ann. Flow (ac-ft)	Avg. Flow (cfs)	Total Violations
1964	158,531	219	10
1965	128,852	178	4
1966	150,678	208	46
1967	238,117	329	15
1968	129,098	178	6
1969	155,557	215	52
1970	213,290	294	68
1971	179,572	248	125
1972	122,811	169	74
1973	132,523	183	60
1974	704,351	972	55
1975	274,899	379	46
1976	126,387	174	176
1977	119,220	165	186
1978	177,794	245	62
1979	224,694	310	0
1980	322,039	444	0
1981	281,910	389	0
1982	467,282	645	0
1983	1,289,079	1,779	0
1984	568,672	785	0
1985	249,660	345	3
1986	494,362	682	0
1987	308,694	426	0
1988	255,268	352	0
1989	329,308	454	0
1990	232,733	321	0
1991	270,280	373	0
1992	354,273	489	0
1993	366,965	506	0
1994	354,770	490	0
1995	718,463	991	0
1996	519,146	716	0
1997	887,533	1,225	0
1998	1,297,593	1,791	0
1999	461,849	637	0
2000	560,003	773	0
2001	383,758	530	0
2002	482,673	666	0



State Water Resources Control Board



Terry Tamminmen
Secretary for
Environmental
Protection

Division of Water Rights
1001 I Street - 14th Floor • Sacramento, California 95814 • (916) 341-5300
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 Web Site Address: <http://www.swrcb.ca.gov>
Division of Water Rights: <http://www.waterrights.ca.gov>

Arnold Schwarzenegger
Governor

WATER RIGHT COMPLAINT

For information in filling out this form,
see pamphlet titled "Investigating Water Right Complaints"

CID# _____
File: _____ (For staff use only)

Complainant

<u>County of Humboldt, California</u> (Contact: Supervisor Jill Geist)	<u>707-476-2395</u>
(Name)	(Phone No.)
<u>825 5th St., Rm 111, Eureka, CA</u>	<u>95501</u>
(Address)	(Zip Code)

Party complained against (Respondent)

<u>U.S. Dept. of Interior - Bureau of Reclamation,</u>	<u>202-208-7351</u>
(Name) Secretary Gale Norton	(Phone No.)
<u>1849 "C" St., N.W., Washington, D.C.</u>	<u>20240</u>
(Address)	(Zip Code)

Location of Respondent's Diversion

The diversion is located on: Trinity River - Lewiston Dam
(Name of Spring, Stream, or Body of Water)

At a point within _____ ¼ of _____ ¼ of Section _____ T _____ R, _____ B&M

County of Trinity Assessor's Parcel No. _____

The general location is as follows: _____
(Name of Road, Distance to Nearest Town, Etc.)

Description of Complaint

The following situation or condition is occurring (attach additional sheets, photographs, maps, sketches, reports, etc. as needed.)

See attached page 1 and attachments.

Injury to Complainant or Public Trust Resources

The situation is causing injury to me or public trust resources as follows (attach additional sheets if necessary):

See attached Page 2.

Possible Resolution of Complaint

I offer the following possible solution to the situation (attach additional sheets if necessary):

Humboldt County requests recognition and implementation of Humboldt County's

1959 water contract as a preface to any CCAP contract negotiations.

Complainant's Diversion and Water Rights (Fill in if Injury Claimed)

My diversion is located on: _____
(Name of Spring, Stream, or Body of Water)

At a point within _____ ¼ of _____ ¼ of Section _____ T _____ R, _____ B&M

County of _____ Assessor's Parcel No. _____

I use water for (what and where): _____

The basis of my claim to divert water is:

An appropriative right under Licence No. _____, Permit No. _____, Application No. _____

A Riparian or pre-1914 claim supported by Statement of Water Diversion and Use No. _____

Other (Describe): _____

A copy of this complaint has been sent to the Respondent by:

- Certified Mail Regular Mail Personal Delivery

I declare under penalty of perjury that the above is true and correct to the best of my knowledge and belief.

[Signature]
 Signature

May 4, 2004
 Date

NOTE: Send original Complaint to the Division of Water Rights and a copy to the Respondent. Forms for submitting an Answer to Complaint will be sent to the Respondent by the Division of Water Rights.

WATER RIGHT COMPLAINT
State Water Resources Control Board
May 4, 2004

Description of Complaint:

Humboldt County has a 1959 permanent contract with the Bureau of Reclamation (BOR) for 50,000 acre-feet of water every year and has repeatedly expressed our desire to make this water available.

On March 25 of 2003, the Board of Supervisors notified the Department of the Interior and BOR of our intent to have that water be made available for the beneficial uses associated with fisheries on the lower Klamath, Trinity/Klamath confluence and Trinity River. A year has transpired and, to date, neither the Department of the Interior nor BOR has replied.

Attached: March 25, 2003 letter to Department of Interior
 1959 Contract with Bureau of Reclamation
 July 1, 2003 letter to Bureau of Reclamation – Central Valley Operations
 July 25, 2003 letter to Department of Interior, Honorable William Myers

WATER RIGHT COMPLAINT
State Water Resources Control Board
May 4, 2004

Injury to Complainant or Public Trust Resources:

Humboldt County's interest in the Central Valley Project (CVP) is recognized in the 1955 Trinity River Diversion Congressional Act which authorized the construction and operation of the CVP's Trinity River Division (TRD). The Trinity Diversion exports the majority of the Trinity's water to the Sacramento River.

The first provision directs the Secretary of the Interior to determine needed releases from the TRD to the Trinity River for the preservation and propagation of Trinity River basin fish and wildlife, subject to a statutory minimum release. The second proviso provides that "*not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users.*" The State of California issued a number of permits associated with the TRD in 1959.¹ Among the conditions established by the state in the permits was Condition 8² that applied to the first proviso and Condition 9³ that applied to the second provision.

¹ State Water Permits under Applications Nos. 5627, 15374, 15376, 16767 and 16768 (September 16, 1959).

² Condition 8. "Permittee shall at all times bypass or release over, around or through Lewiston Dam the following quantities of water down the natural channel of Trinity River for the protection, preservation and enhancement of fish and wildlife from said dam to the mouth of said stream;

October 1 through October 31	200 cfs
November 1 through November 30	250 cfs
December 1 through December 31	200 cfs
January 1 through September 30	150 cfs

Any water released through said Lewiston Dam for use in the fish hatchery now under construction adjacent thereto shall be considered as partial fulfillment of the above schedule."

³ Condition 9. "Permittee shall release sufficient water from Trinity and/or Lewiston Reservoirs into the Trinity River so that not less than an annual quantity of 50,000 acre-feet will be available for the beneficial use of Humboldt County and other downstream users."